JD–22–21
Commerce, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, DC

XPO CARTAGE, INC.

Respondent

and

Cases 21–CA–150873
21–CA–164483
21–CA–175414
21–CA–192602

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Charging Party

*Matthew J. Sollett, Esq.,* and *Molly Kagel, Esq*.,
for the General Counsel.
*Michael Marino, Esq., Holger Besch, Esq.* and *Samuel Rubinstein, Esq.,*
for the Respondent.
*Hector de Haro, Esq.,*
for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. On September 12, 2018, I issued the initial decision in these consolidated cases finding that the drivers were employees of the Respondent, and the Respondent committed several 8(a)(1) and (3) violations of the National Labor Relations Act (NLRA/the Act). The General Counsel,[1] XPO Cartage, Inc. (the Respondent), and the International Brotherhood of Teamsters (the Charging Party) filed timely exceptions to the decision. While the exceptions were pending before the National Labor Relations Board (NLRB/the Board), on January 25, 2019, the Board issued its decision in *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (2019) overruling *FedEx Home Delivery*, 361 NLRB

[1] Peter Robb was the general counsel when the consolidated complaint and notice of hearing was issued. On January 25, 2021, President Joseph R. Biden designated Peter Sung Ohr, Regional Director of Region 13 in Chicago, to serve as Acting General Counsel of the NLRB. Since this complaint was issued under the Peter Robb, I will refer to actions taken by Peter Robb as "the General Counsel" and those taken by Peter Sung Ohr on or after January 25, 2021, as "the Acting General Counsel."

610 (2014) "to the extent the FedEx decision revised or altered the Board's independent-contractor test" and returned to the common-law test the Board applied before *FedEx*. Consequently, on March 26, 2019, the Board issued to the parties a Notice to Show Cause why this case should not be remanded to the administrative law judge for further proceedings. On April 9, 2019, the General Counsel filed a response that he did not oppose remand. On April 9, 2019, the Respondent filed an answer opposing remand and reopening of the record; and the Charging Party also objected to remand and reopening of the record. On May 10, 2019, the Board rejected the Respondent's and the Charging Party's objections and remanded this case to me for further consideration under *SuperShuttle*. The Board's order stated the case is remanded, "for the purpose of reopening the record, if necessary, and the preparation of a supplemental decision addressing the complaint allegations affected by *SuperShuttle* and setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order."

On May 24, 2019, I issued an order to the parties setting filing dates for motions on whether to reopen the record in this proceeding for the purpose of offering any new evidence regarding employee status considering the holding in *SuperShuttle.* In my orders and during several conference calls, I notified the parties that reopening the record in this case is limited to reconsidering whether the drivers are employees under the new test for determining employee status as set forth in *SuperShuttle*. The General Counsel moved to reopen the record.[2] On June 24, 2019, the Charging Party filed its response in opposition to reopening the record. Despite its initial opposition to reopening the record, on June 10, 2019, the Respondent submitted a response in support of reopening.[3] I subsequently issued an order reopening the record and setting a date for the supplemental hearing.

The consolidated complaint also charges that the Respondent's misclassification of drivers as independent contractors "in and of itself" violates §8(a)(1) of the Act. However, on October 8, 2020, during the hearing, the counsel for the General Counsel withdrew the charge. Therefore, the sole allegation for me to reconsider is whether, under the analysis set forth in *SuperShuttle*, the drivers who transport merchandise for the Respondent's customers are employees of the Respondent as defined by the Act or independent contractors who are excluded from coverage. See section 2(3) of the Action.[4]

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[2] The General Counsel's brief was filed on June 10, 2019.

[3] On April 9, 2019, the Respondent filed a response to the Board's March 26, 2019, Notice to Show Cause arguing that it was not necessary to reopen the record because of the Board's decision in *SuperShuttle*.

[4] In granting the motions to reopen the record, I told the parties that, consistent with the Board's remand order, the only evidence to be considered is that which is necessary for me to determine whether the drivers are employees as defined by the Act or independent contractors under the test set forth in *SuperShuttle*. Moreover, I advised the parties that if I found that the drivers are not employees as defined by the Act, the remaining allegations must be dismissed. I explained to the parties that if, however, I determined that under the test set forth in *SuperShuttle* the drivers are employees, relitigating the evidence for the remaining allegations was unnecessary because findings on most of those allegations were made based on credibility determinations. These findings were unlikely to change absent a clear preponderance of all the relevant evidence convinced me that the findings were made in error.

This supplemental decision incorporates and supplements the findings and conclusions contained in my initial decision. Therefore, refer to the initial administrative law judge decision (ALJD)[5] section entitled "Findings of Fact" and its subsections for a complete description of the record of facts established in the underlying trial.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following findings of facts and conclusions of law.[6]

## FINDINGS OF FACT

### 1. Respondent's Agents[7]

Since early 2018, Troy Tibbetts (Tibbetts) has been the Respondent's vice president of transportation. His area of oversight includes the Commerce facility. During the period at issue, Tibbetts worked for Bridge Terminal Transport (BTT) which was acquired by the Respondent. The Respondent subsequently retained Tibbetts in a management role. Kristina Quiroz (Quiroz) is the Respondent's customer service manager in Commerce, California. From 2018 to 2020 she was the intermodal operations manager and from 2014 to 2018 served as the planning manager. Quiroz has worked, on and off, for 32 years at the Commerce facility. Armando Rodriguez (Rodriguez)[8] and Felipe Flores work as dispatchers for the respondent. Since 2016, Enrique Flores has worked for the Respondent at the Commerce facility as the regional safety manager.[9]

### 2. Compensation Rates for Drivers

The Independent Contractor Operating Contract (ICOC) Schedule B is a document that has the "stated rates that will be offered to owner-operators for a certain type of activity". The Respondent, without input from the drivers, determines the Schedule B general rates it will pay them to haul goods for its customers. Every 90 days the Schedule B rates can and, or will change and that is published 15 to 30 days prior to the change for the drivers to view. If the rate changes during the contract period with a client, the Respondent may adjust the rate charged the customer depending on the terms of their contract. The Respondent's compensation to drivers is

[5] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for the General Counsel's exhibit; "R. Exh." for the Respondent's exhibit; "CP Exh." for the Charging Party's exhibit; "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's brief; "R Br." for the Respondent's brief; and "CP Br." for the Charging Party's brief. "ALJD" references the initial administrative law judge decision I issued in this case on September 12, 2018.

[6] My findings and conclusions are not based solely on citations I have highlighted in this decision, but rather on my review and consideration of the entire evidence of record in this case.

[7] Refer to the ALJD "Findings of Fact" for a more detailed list of the Respondent's supervisors and agents who were involved in the allegations at issue.

[8] Rodriguez and Enrique Flores also testified in the underlying trial.

[9] I will refer to Felipe Flores and Enrique Flores by their full names to avoid confusion.

one of the many factors considered when determining the rates that the Respondent will charge its customers.

Drivers compensation can also include premium or incentive payments. While the drivers are unable to negotiate with the Respondent over the general rates in schedule B, there are occasional negotiations about the premium rates. (Tr. 2255–2256.) The ICOC contains a mechanism for premium associated rate changes. It gives the Respondent flexibility to negotiate with drivers to pay them a premium for taking a load that, for a myriad of reasons, is difficult to assign. For example, drivers who have HAZMAT endorsements are paid a premium for hauling those products. Likewise, drivers get paid incentives to take assignments with extra stops. For moves difficult to dispatch, the Respondent allows for autonomy among its terminals "to utilize premiums to compensate owner-operators over and above what the schedule B amount" would allow. (Tr. 2201.) In the current and the underlying trials, the evidence established that in 2015 and 2016, drivers hauling goods for the Respondent's customers earned compensation ranging from a low of about twenty-five thousand dollars to a high of approximately five hundred thousand dollars a year. In 2015, sixty-two or sixty-three drivers who received assignments out of the Commerce facility earned in excess of one hundred thousand dollars a year. In some instances, the compensation included premium pay.

3. Dispatch Assignment of Moves

When individuals are initially recruited to haul for the Respondent's customers, they are introduced to the dispatchers. Drivers have several options for work assignments and schedules. The dispatchers work to learn the drivers' preferences for: start and stop times, days they want to work, routes they prefer, and length of their workday because these factors help the dispatchers determine how to assign loads for delivery. On those occasions when a driver refuses a delivery assignment or it is a difficult load to dispatch, the dispatchers work to find another driver to accept the load or seek outside carriers for help or bundle a group of moves so it is more appealing to the driver. Rescheduling the customer's appointment is done as a last resort.

4. Driver Safety Requirements and Discipline

The Federal Motor Carrier Safety Administration (FMCSA) has a compliance program entitled the Compliance Safety and Accountability (CSA) program.[10] It keeps track of the safety performance of drivers and motor carriers and assigns numerical scores to individual drivers and motor carriers indicating the level of their safety compliance. A low CSA score equates to a good level of compliance whereas a high score indicates a poor safety record. It is common practice in the drayage industry for potential customers to consider a motor carrier's CSA score when deciding whether to contract with it to move the customer's product.

At the start of their onboarding[11] process, the Respondent gives drivers a document entitled "CSA Know the Basics" which is a summary of the CSA program. In addition to federal

[10] The CSA program is discussed in more detail in my initial decision for this complaint.

[11] Onboarding is the term used within the Respondent's organization to describe the processing into the company of a newly contracted driver.

requirements, the Respondent has a policy that if a driver accumulates more than 75 points, the Respondent will terminate the driver's contract or disqualify him or her from driving for the Respondent. This 75-point limit is not a governmental mandate. Drivers can accumulate CSA points for a myriad of violations. An example is a poor result from a roadside inspection conducted by the California Highway Patrol (CHP). Moreover, a poor roadside inspection can raise the CSA score for both the driver and motor carrier. The Respondent has several methods for addressing drivers with high CSA scores. The Respondent will schedule a one-on-one counseling session with the driver; and at the end of the counseling session the driver and a Respondent management official will sign a document noting the counseling session. (GC Exh. 85.) Also, the Respondent requires that the driver complete, within a predetermined time frame, an online remedial training course. Although, the online remedial training can be completed on any computer terminal, the driver needs a company issued username and password to access the training. While governmental regulations do not require the Respondent to provide the training, regulations do mandate that the Respondent certify that it has a place for drivers to be qualified and trained. If, however, the driver cannot get the training on their own, the Respondent can provide it to them. The driver also has a deadline to complete paperwork explaining how the driver will avoid poor roadside inspections in the future. If the driver does not complete the online remedial training or paperwork by the deadline, the Respondent will take the driver out of service. Also, from 2013 to March 2016, the Respondent would fine drivers who received a poor roadside inspection by deducting money from their earnings.

The Respondent also issues counseling to drivers for a failure to conduct the required pre-trip inspection. For a pre-trip inspection violation, the driver is counseled and must complete online remedial training. A failure to conduct the pre-inspection on more than one occasion can lead to termination of the driver's contract with the Respondent. Likewise, between 2015 to 2017, drivers were counseled if they violated hours of service limits; and repeated violations of the hours of service limits resulted in termination of the driver's contract with the Respondent. Further, there are a number of infractions that if committed by a driver will result in the Respondent disqualifying the driver from hauling it. Disqualification from driving for the Respondent and termination of the driver's contract with the Respondent have different meanings. A disqualified driver may be able to requalify to drive or the disqualified driver can hire someone else to drive the truck on the disqualified driver's behalf; but a contract termination means the driver nor anyone driving his truck can no longer haul goods for the Respondent's customers.

5. Respondent System for Tracking Driving Violations

The Respondent has a dispatch system, "All Ways", that tracks the number of moves drivers make on a daily basis. At some point between 2015 and 2017, the Respondent contracted with RARE Technologies (RARE) to process information provided in the drivers' logs, which would also capture driving violations. RARE would then give this information to the Respondent in the form of a Violation Summary Letter. Last, pursuant to governmental regulations, the Respondent, and presumably all motor carriers, are required to conduct an annual Motor Vehicle Record (MVR) review with drivers who haul for them.

## DISCUSSION AND ANALYSIS

### 1. Independent Contractor versus Employee Status

In *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 88 S.Ct. 988 (1968), the Supreme Court held that common-law agency principles are used to decide whether a worker is an employee protected under the Act or a statutorily exempt independent contractor. The Supreme Court noted that in applying the common law principles, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" but rather the important point, "is that the total factual context is assess in light of the pertinent common-law agency principles." at 88 S.Ct. 988. Consequently, the Board and the courts have used the Restatement (Second) of Agency §220 (1958) as a roadmap for analyzing these types of cases under the common-law agency principles. The Board typically looks at ten non-exhaustive common-law principles, set forth in the Restatement (Second), to determine whether the party arguing for a worker to be classified as an independent contractor has met its burden. The Board relies on common-law agency principles as guided by the following nonexhaustive common-law principles:

a.) The extent of control which, by the agreement, the employer may exercise over the details of the work.

b.) Whether or not the one employed is engaged in a distinct occupation or business.

c.) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

d.) The skill required in the particular occupation.

e.) Whether the employer of the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

f.) The length of time for which the person is employed.

g.) The method of payment, whether by the time or by the job.

h.) Whether or not the work is part of the regular business of the employer.

i.) Whether or not the parties believe they are creating the relation of employer and employee.

j.) Whether the principal is or is not in the business.

Id.; Restatement (Second) of Agency. The party asserting that individuals are independent contractor, and thus are not covered under the Act has the burden of proof. *BKN, Inc*., 333 NLRB 143, 144 (2001).

In *FedEx*, the Board "restate[d] and refine[d]" its approach to analyzing questions of whether a worker is an independent contractor or employee. The Board stated that in evaluating independent-contractor status it would also analyze, as a separate factor, the "significance of a putative independent contractor's entrepreneurial opportunity for gain or loss" that is actual and not merely theoretical. *FedEx*, supra at 624. Subsequently, in *SuperShuttle*, the Board overruled *FedEx* and created a new analytical framework for evaluating whether a worker is an independent contractor or employee. The Board decided that, unlike in *FedEx*, entrepreneurial opportunity should not be evaluated as an individual factor, but rather the fact-finder "may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." *SuperShuttle*, supra at 15. The Board explained that, "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." Id. Shortly after overturning *FedEx*, the Board applied the new legal framework in a succession of cases. See *Velox Express, Inc*., 368 NLRB No. 61 (2019); *Intermodal Bridge Transport*, 369 NLRB No. 37 (2020); and *Nolan Enterprises, Inc*., 370 NLRB No. 2 (2020).

The General Counsel and the Charging Party argue that my finding in the underlying hearing that Respondent maintains significant control over the drivers' work should remain undisturbed because the evidence presented at the supplemental hearing has only strengthened my conclusion. Moreover, the General Counsel insists that *Intermodal Bridge Transport* is most closely aligned with the present case and as such should be looked to for guidance. The Respondent counters that the evidence shows the drivers have significant control over many aspects of their work and working conditions, thereby establishing that they have significant opportunity for economic gain or significant risk of loss; and, as such, this case is more closely aligned with the facts in *SuperShuttle*.

Analyzing the common-law factors through "the prism of entrepreneurial opportunity", I find that Respondent's drivers have little opportunity for economic gain or, conversely, risk of loss and as such are employees.

1. Extent of control employer exercises over the details of the work

After careful consideration of the entire record of evidence, I again find that the Respondent maintains significant control over the drivers' work. The Respondent argues that the evidence establishes the drivers have "significant initial economic investment and face equal economic risk", control over their work schedules, discretion over which loads to accept, an ability to increase and negotiate compensation, and an ability to hire drivers to work for them.[12] Notwithstanding, I find in most instances this control is merely illusory. This finding is supported by the evidence showing the extent of the Respondent's control over: virtually all aspects of the company's interaction with the clients; the drivers' compensation for deliveries and other services; scheduling of the drivers deliveries; the types of equipment drivers must use

[12] Individuals hired by drivers to operate their trucks are termed "second seat" drivers. An example of this arrangement is driver Jose Solis (Solis) who owns two trucks and employs two second seat drivers. (ALJD, "Findings of Fact").

for deliveries; the type of insurance drivers must maintain pursuant to their contract with the Respondent; requirement that the trucks are branded in the Respondent's name when delivering for its clients; and the standardization of the contract between the drivers and the Respondent.

The Respondent argues that the drivers have unilateral control over "whether, when, where, and how long" to drive. In support of this assertion, the Respondent points to testimony from several drivers and, or managers that: drivers never have to drive but rather can delegate their driving to second-seat drivers; and drivers are not scheduled shifts or assigned to delivery regions. In the underlying trial, I found that the drivers have some control over their work assignments, work schedules, and opportunity to work for other companies. There was almost universal agreement from the drivers who testified that they decide which loads to accept, the number of hours to work, which shift to work, when to take time off from work, when to take breaks, selection of the delivery route, and exclusive control over the trucks they drive which includes most maintenance and repair decisions. Although the General Counsel argues that in practice drivers are retaliated against for rejecting loads, in the underlying trial I found otherwise. The Independent Contractor Operating Contract (ICOC) specifically allows drivers to reject loads without suffering negative consequences from the Respondent; and I find there is no substantive evidence showing that drivers are retaliated against for exercising this right. (GC Exh. 60 sec. 4(D) and Schedule N.) The drivers' right to reject loads is not merely theoretical. See II(A). Moreover, there was no new and substantive evidence introduced in the supplemental trial to contradict these findings.

Although drivers can and do decide when to accept or reject loads, once drivers accept assignments, they maintain limited control over their schedules. The evidence establishes that the Respondent alone determines the pickup and delivery locations and sets specific appointment times based on the customer's request. A tiny portion of the Respondent's customer base allows some flexibility in the delivery times, but the flexibility only extends from 24 hours to a 3-day window for pickup or delivery. Additionally, the evidence establishes that the Respondent solicits the client base, negotiates shipping contracts with the clients, and interacts with clients regarding scheduling, and services. Moreover, it is the Respondent's dispatchers and not the drivers who contact the customers if there is a problem with the delivery or the time of the delivery. The Respondent uses a software program to track the timing, and to a lesser extent, the movement of deliveries to help its dispatchers control their flow and deal with any complaints from clients regarding their shipments. The driver has virtually no contact with the customer except for the minor interaction (receiving a client signature) that might occur when delivering the load. There is also no evidence that drivers have a proprietary interest in routes with the ability to sell or transfer them.

The Respondent argues that the wide range of compensation levels among the drivers is proof that they have significant opportunity for economic gain or loss. In support of its argument that drivers have "actual significant potential for economic gain" or loss, the Respondent points to the limited evidence presented that some drivers earned as little as $25,000 in a year while the highest earning driver earned over $500,000. Furthermore, the Respondent contends that I incorrectly found that only two drivers, as opposed to eight to ten drivers, hired other drivers to work for them. I do not find the argument persuasive. Even assuming I was incorrect on this point, a finding that eight drivers hired second-seat drivers still does not negate the rarity of this

occurrence. In the underlying hearing it was established that in 2015, about 130 drivers operated from the Respondent's Commerce terminal. (ALJD 4–5; Tr. 1710, 1931–1932, 1937) Evidence of two or even eight incidents of drivers hiring others to drive for them does not convincingly establish that drivers have an "actual significant potential for economic gain" or loss. Moreover, the evidence remains that drivers earning six figures, regardless of how often they drive, is a rarity. Further, the drivers' ability to hire second seat drivers is contingent upon the Respondent granting approval. While the Respondent insists that the drivers are solely in control of hiring second seat drivers, the facts prove otherwise. The ICOC, including Schedule T, mandate that the second seat driver's application be submitted to the Respondent for review and approval. The Respondent argues that it simply reviews the second-seat drivers' applications and documents to ensure that the state and federal requirements are met. However, the Respondent's own witness, Miguel Camacho (Camacho)[13], admitted that Humberto Canales (Canales) was rejected as a second seat driver for reasons totally unrelated to federal mandates. Camacho acknowledged that Canales' second seat driver application was rejected because the dispatchers felt Canales was difficult, rude, and demanding. The Respondent insists that this finding is incorrect because it has "the ability without affecting employment status to insist that the Owner-Operator not use a particular driver who disrupts and interferes with the safety of [the Respondent's] dispatching operation." (R. Br. 13.) While there was evidence that Canales was argumentative and rude, there is no persuasive evidence that he was a safety risk. Regardless of the legitimacy of the reasons for rejecting Canales' application, if the driver had true control over hiring the second seat driver, barring Canales' failure to meet state or federal requirements, the driver should have been the ultimate decisionmaker instead of the Respondent's regional manager, Javier Martin Del Campo (Del Campo).[14] (ALJD 47–49).

The evidence also established that the drivers do not solicit customers for the Respondent, have no control over rates charged the customers, and no meaningful interaction with them. I find that the drivers have no substantive ownership interest in the work other than their investment in the truck, which in many cases they do not own. Even the small number of drivers who had second-seat drivers or more than one truck have no significant proprietary interest in the routes or overall business.

Accordingly, I have reevaluated this factor through the lens of entrepreneurial opportunity and based on the evidence find that this factor weighs in favor of employee status.

2. Whether drivers are engaged in a distinct occupation or business; and whether the drivers' work was part of the Respondent's regular business

[13] In the underlying trial, the evidence established that Camacho began his career with the Respondent as a dispatcher. He held subsequent positions with the Respondent as manager of rail-to-rail lease drivers; operations manager/driver liaison of the Commerce, San Diego and Rancho Dominguez facilities; and general manager of the Commerce facility.

[14] In the underlying trial it was established that in September 2016, Del Campo was promoted to general manager of the Commerce terminal and served in that position until his resignation in August 2017.

During the underlying trial, the General Counsel argued that the drivers lack the infrastructure and administrative support needed to operate as an independent business. According to the General Counsel, the drivers are "independent in name only" because: the drivers do business in the name of the Respondent; and the Respondent provides the customers, clerical support, forms, credit cards, and scanners. The General Counsel maintains this position. The Respondent countered that the evidence supports a finding that the drivers are engaged in a distinct business because: "many" of the drivers are incorporated and hire and compensate their own drivers; several drivers simultaneously work for other companies while transporting cargo for the Respondent's clients; the drivers are not required to wear items identifying them with the Respondent; and the drivers own or lease vehicles of their own choosing, personalize their vehicles, and pay for essentially all the costs associated with truck ownership.

During the supplemental trial, the Respondent attempted to bolster its argument by emphasizing the number of drivers who are incorporated and hire second-seat drivers. The Charging Party counters that the ability of drivers to hire second-seat drivers or perform work for other companies is an illusion because the Respondent has the ultimate control over who can be hired as a second-seat driver. I find merit in the Charging Party's position. There is evidence, albeit minimal, that a small number of the drivers are incorporated, hire and compensate second-seat drivers, and simultaneously work for the Respondent and other companies. During the period at issue, there were about 130 drivers hauling out of the Commerce terminal. In the underlying trial, I found that fifteen drivers were incorporated, 2 hired second-seat drivers, and 1 simultaneously worked for the Respondent and other companies. However, the Respondent now disputes this number and insists the evidence shows "eight to ten Owner-Operators had drivers operating under them." Moreover, the Respondent argues that if it had been allowed to enhance the record, the evidence would have shown approximately twenty drivers hired other drivers to work for them. (R. Br. 10; R. Br. 10, fn. 1)

Even assuming that in the underlying administrative trial I incorrectly calculated the number of drivers who hired second-seat drivers, the number is still negligible. The Respondent claims the evidence actually revealed that eight to ten drivers hired other people to drive for them. However, eight to ten drivers are less than 10 percent of the total number of drivers hauling out of the Commerce facility which is inconsequential. I do not need to address the Respondent's argument that it should have been allowed to supplement the record with evidence of other drivers hiring second-seat drivers. I explained to the parties and ruled pretrial, during the trial, and posttrial that evidence which could and, or should have been introduced in the underlying trial would not be allowed into evidence in the current proceedings. Additional evidence addressing the number of drivers who hired other people to drive for them falls into this category.

Second, there continues to be scant evidence of drivers simultaneously working for the Respondent and other companies. The ICOC includes an "alternative uses of vehicles" provision allowing the driver to use the truck to haul for other carriers or companies; and gives drivers who possess one or more trucks the right to hire workers (second-seat driver) to drive for them. Drivers are required to sign the Schedule T which sets forth in detail the requirements for a driver's alternative use of the truck. If the driver uses the truck to haul for other companies or hires second seat drivers, the provisions require the driver to, among other actions: (1) have the

second seat driver(s) to submit an application and supporting documentation to the Respondent for approval; (2) use the driver's own DOT number and cover the Respondent's name and other identifying marks when working for other companies; (3) under applicable circumstances, when using the truck for another company, obtain insurance separate and apart from that used while hauling for the Respondent or obtain proof of indemnity bond; and (4) indemnify the Respondent for any charges, liabilities or fees imposed on the Respondent as a result of misuse. (GC Exh. 52, Schedule T.) The Charging Party points to these and other requirements as proof that the Respondent erects hurdles that make it almost impossible for drivers to simultaneously work for the Respondent and other companies.

Although the Respondent insists drivers were not prohibited from simultaneously working for other companies while also hauling for the Respondent, all of the drivers at the administrative trial testified that they had not done so. Additionally, Rodriguez acknowledged that all, except three of the drivers on the day shift, worked 10 hours a day, 5 to 6 days a week, which would have precluded them from performing any significant amount of work for other companies without violating DOT limits on the number of hours a driver can drive. (Tr. 1680–1681.) Consequently, the facts are clear that the *actual* opportunity to work simultaneously for another company and the Respondent does not exist, unless one is able to hire a second seat driver.

The pivotal question concerning this common-law principle is "whether or not the work is part of the regular business of the employer." Restatement (Second) of Agency § 220(2)(h). Stated another way, the question is whether the drivers are "a regular and essential part of the company's business operations." *Roadway Package System, Inc*., 326 NLRB 842, 851 (1998). The Respondent argues that it is not in the same business as the drivers because the drivers "are in the business of actually driving goods from point to point, utilizing their special licenses and skills as Class A commercial drivers. XPO, in contrast, performs logistical coordination between customers, ports, and rail yards." (R. Br. 116.) The General Counsel contends that "the movement of containers by the drivers is the core of Respondent's operation." (GC Br. 87.) Moreover, the General Counsel disputes the Respondent's argument that evidence of some drivers being incorporated is proof they operate as independent businesses. The General Counsel points to the testimony from Enrique Flores that the Respondent gave drivers a financial incentive to incorporate which illustrates their decision to incorporate was done only to "take advantage of a benefit offered by Respondent." (GC Br. 22, fn. 5.) Thereby, implying the drivers would not have taken advantage of the opportunity without the incentive. I do not find this particularly persuasive because it is not supported by any credible testimony from drivers. Nevertheless, the fact that a small number of drivers are incorporated and can hire second-seat drivers is not decisive evidence of their independent contractor status. The Board noted in *Sisters' Camelot*, 363 NLRB 162, 164 (2015) that "the ability to work for multiple employees does not make an individual and independent contractor." See also *NLRB v. United Insurance Co.*, 390 U.S. 254, 258–259 (1968), enfg. 154 NLRB 38 (1965) (found as a "decisive" factor that employees' functions were an "essential part of the company's normal operations"); *Intermodal Bridge Transport*, 360 NLRB 227 (2020) (the ability to work for multiple employers is not a controlling factor evinced by the Act which covers part-time and casual employees who often work for multiple employers) The Respondent could not perform its function without the

drivers.[15] When performing this function for the Respondent, drivers use their trucks which are emblazoned with the Respondent's name and logo. To the casual observer, most likely, the driver and truck are indistinguishable from the Respondent.

Accordingly, I have reevaluated this factor through the lens of entrepreneurial opportunity and based on the evidence find that this factor weighs in favor of employee status.

3. Whether work is usually done under the direction of the employer or by a specialist without supervision

The General Counsel argues that evidence presented at the supplemental hearing that the Respondent disciplines drivers proves it exercises close supervision of them. According to the General Counsel this point is proven because: (1) drivers' CSA scores and the Respondent's CSA score are inextricably linked; (2) the Respondent takes adverse actions not required by government regulations against drivers for violations; and (3) the Respondent issued counseling sessions amount to discipline. Likewise, the Charging Party asserts that the evidence establishes the Respondent exerts supervision over the drivers that indicates they are employees. According to the Charging Party, Enrique Flores provided "extensive" testimony that the Respondent conducts "reviews of drivers' performance metrics, counseling and training" as a result of drivers' violations of the Respondent's rules and requirements.

Although the drivers are not supervised while driving and have discretion in choosing the delivery route, this is not necessarily indicative of an independent contractor status. Rather, it reflects the nature of the job itself. "In some types of cases which involve persons customarily considered as [employees], there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a[n] [employee] although it is understood that the employer will exercise no control over the cooking." Restatement (Second) of Agency § 220(1) cmt. D. Moreover, while the Respondent does not dictate the drivers' work schedule, require the drivers to work a set number of hours, or control when the drivers choose to take days off from working, the Respondent, through the dispatchers, controls the distribution of work assignments to the drivers. Further, the drivers are not allowed to directly contact customers if: there are problems with the pickup or delivery; if the customer wants to add extra services; or if the driver has questions about the delivery or pickup. All information about the moves is controlled by the dispatchers who relay the relevant portions of the move to the driver when they accept the assignment. Further, there is also no substantive evidence of an agreement between the Respondent and the drivers for close supervision.

In the underlying trial, I found that the record was devoid of evidence that the drivers receive evaluations, audits, or training. However, the General Counsel contends that my prior

[15] In a decision with facts similar to those at issue, the California DLSE held that the drivers were at the very core of the employer's regular business. *Naranjo, Townsel and Sivveyra v. Intermodal Bridge Transport*, Case Nos. 05-62622; 05-62704KR; and 05-664459KR ("Plaintiff's work is the basis of Defendant's business. Defendant obtains customers who are in need of delivery services and provides workers who conduct the service on behalf of Defendant. Without drivers, Defendant would not be able to operate its business.")

finding was incorrect because evidence at the supplemental trial revealed the Respondent holds "counseling" sessions with drivers about performance issues beyond what is required by governmental regulations. According to the General Counsel, the counseling meetings amount to discipline because (1) drivers' individual records and the Respondent's overall CSA scores are "inextricably" linked; (2) the Respondent uses drivers' violations to "enforce policies and practices that are more stringent than government requirements"; and (3) based on Board law the counseling sessions constitute discipline. The Charging Party agrees with the General Counsel's arguments. (CP Br. 22–23.) The Respondent did not supplement its argument on this point except within the context of its overall contention that the evidence establishes the drivers have significant opportunity for economic gain or, conversely, significant risk of loss.

Based on the evidence, I find that the Respondent exerts sufficient direction over the drivers' performance to justify classifying them as employees under this factor. It is undisputed that the Respondent does not subject drivers to traditional, daily in-person supervision. Such supervision would be unrealistic given the type of work the drivers perform. Nonetheless, the instances of discipline, even if occasionally, the Respondent metes out to the drivers "indicate [the] significant control" it has over them. *Sisters' Camelot*, 363 NLRB 162, 163 (2015) (citing *Dial-A-Mattress Operating Corp*., 326 NLRB 884, 892–893 (1998). Enrique Flores testified that in his role he speaks with drivers about proper maintenance of their vehicles and how to improve their profit margins. He also acknowledged that the Respondent requires drivers, who receive a poor roadside inspection, to complete remedial online training and the attendant paperwork within a designated timeframe, which is not a federal or state regulatory requirement. If the driver fails to timely complete the remedial training and, or paperwork the Respondent takes them out of service. The evidence does not clearly establish that federal regulations require the Respondent to provide the actual training. The Respondent is, however, pursuant to federal regulations, required to certify that it has "a ***place*** where drivers can be qualified and trained" on topics ranging from hours of service to hazardous materials transportation. (Tr. 2431) (emphasis added) During the period January 2013 to March 2016, the Respondent also fined drivers who received poor roadside inspections by deducting money from their earnings. Leveling fines against the drivers is also not a federal or state requirement. At some point during the relevant period, the Respondent held individual counseling sessions with drivers who failed to complete a pre-trip inspection. Drivers were also counseled for having a high CSA score. Although not a federal requirement, if a driver accumulates 75 points or more, the Respondent disqualifies the driver from hauling for it and/or terminates the driver's contract. The Respondent also terminates drivers who repeatedly violate hours of service.

Accordingly, I have reevaluated this factor through the lens of entrepreneurial opportunity and based on the evidence find that this factor weighs in favor of employee status.

4. The skill required in the particular occupation

The General Counsel argues that my prior finding that this factor weighs in favor of independent contractor status is incorrect because the drivers use their skills "in furtherance of [Respondent's] business." Likewise, the Charging Party disagrees with my prior finding and contends that *Intermodal Bridge Transport* supports overturning me on this point. The Charging Party notes that the Board has found that simply possessing the skills to drive a commercial truck

does not establish that drivers are independent contractors because "the drivers' skills are inherent to the performance of the drivers' duties in furtherance of the employer's business, consistent with the common-law definition of an employee." *Intermodal Bridge Transport,* 369 NLRB No. 37 at 5. The Respondent did not address this factor in its posthearing brief for the remand hearing. Likewise, the Respondent did not produce evidence at the remand hearing to contradict the General Counsel's and the Charging Party's arguments on this factor. Consequently, I agree with the General Counsel and Charging Party on this point because the evidence and Board law support it.

In *Intermodal Bridge Transport,* the Board found that this factor weighed in favor of employee status because the drivers' skills "are inherent to the performance of the drivers' duties in furtherance of the employers' business" and the employer provided training to drivers who needed it. I agree that the overall evidence shows that the Respondent would be unable to carry out its core mission without the drivers' skill at hauling goods in commercial vehicles. While I found in the underlying hearing that the Respondent conducts periodic voluntary safety training sessions, there continues to be no persuasive evidence that drivers are penalized if they do not attend. However, as discussed above, I find that newly discovered evidence establishes the Respondent does provide required training to drivers who are charged with certain driving violations. The General Counsel points to evidence at the remand hearing that the "Respondent requires its drivers to undergo training to correct deficiencies in their driving record." (GC Br. 26.) As previously discussed, Enrique Flores testified that drivers who receive poor roadside inspections are required to complete remedial online training. He noted that the drivers did not have to complete the training using the Respondent's facility or devices; but they needed company issued usernames and passwords to access the training. Enrique Flores testified, without contradiction, that regulations require it, as a motor carrier, "to certify that we have a place where drivers can be qualified and trained." (Tr. 2431) As I previously noted above, however, there is no evidence that regulations require the Respondent to provide the actual training, which it does.

Accordingly, I have reevaluated this factor through the lens of entrepreneurial opportunity and based on the evidence find that this factor weighs in favor of employee status.

5. Whether the employer or individual supplies the instrumentalities, tools, and the place of work

The Charging Party argues that I failed to consider a "key instrumentality" the Respondent provides to the drivers, the state and federal operating authority. (CP Br. 24.) In its brief the Charging Party notes, "every driver who testified utilizes XPO's operating authority and there is no documentary evidence in the record than any driver moved containers for XPO utilizing their own operating authority, or that they even had their own operating authority during the operative time period." Id. Likewise, as further proof that they could not haul goods for customers independently of the Respondent, the Charging Party points to a lack of evidence that during the period at issue drivers carried their own insurance. The Charging Party argues that simply because they owned a truck and a few other minor instrumentalities does not establish that the drivers possessed true entrepreneurial opportunity necessary for economic gain.

The General Counsel argues that the Board considers not only whether the worker owns the instrumentality by also "*how* the instrumentality can be utilized by the worker." (GC Br. 27; *Velox Express, Inc*., 368 NLRB No. 61, slip op. at 4 (2019)) According to the General Counsel, the controls that the Respondent has placed on how the drivers' can use their trucks makes clear that their "ownership interest in their trucks does not create any significant entrepreneurial opportunity . . ." (GC Br. 28.) The Respondent counters that the drivers are solely responsible for the purchase or lease of their trucks, maintenance of their tractors, and decisions on managing expenses related to the investment. Consequently, the Respondent argues that this factor weighs in favor of employee status because the drivers "face significant economic risk by purchasing or leasing a truck." (R. Br. 15.)

The evidence established that the driver is responsible for: choosing the truck; purchasing or leasing the truck; maintaining, repairing, and getting insurance on the truck; and other responsibilities that come with owning or leasing the truck. Moreover, the drivers provide their own mobile phones, work clothes, safety vests, and any tools they may bring with them in the truck. The Respondent, however, supplies the chassis, the software applications used to transmit assignment details and notify dispatch when the delivery begins and ends, delivery slips (hand tickets), inspection reports, manifest, operator's daily memo, and the operating authority. There is no evidence that the drivers had regular (or any) access to the Respondent's computers, printers, scanners, fax machines, business cards, or email account. The evidence also established that the drivers were free to park their tractors wherever they wanted to park.

It is uncontested that the Respondent provides the customers and maintains an administrative support staff. There was no persuasive evidence introduced at the supplemental hearing to show that the administrative staff's primary function is to support the drivers. The evidence established that the administrative staff's role was to primarily support the Respondent's logistic function. The Comdata credit card is offered as a convenience for the drivers. It allows them to get fuel at a discount from participating retailers; and eliminates the need for the drivers to have readily available funds on hand for fuel purchases. However, the driver, not the Respondent, is wholly responsible for paying the charges on the card. There are scanners used by the dispatchers to assist them to keep track of scheduling, deliveries, and identifying problems in the delivery chain.[16] These scanners are not unique to the Respondent but rather are standard in the logistics industry. It is undisputed that the Respondent, to comply with state and Federal reporting requirements, provides the drivers a limited number of forms to complete on a recurring basis. These forms play a lesser role in the drivers' ability to do their job.

Despite the Charging Party's argument to the contrary, I did consider the state and federal operating authority the drivers were required to get in order to haul for the Respondent. In order to clarify my previous findings regarding this factor, I want to make it clear that I find the operating authority is a crucial instrumentality in the drivers' ability to perform work for the Respondent. Without the state and, or federal operating authority, the drivers would be unable to

[16] In context, it appears that the reference to "scanners" refers to the software application the dispatchers use to keep track of delivery appointments and assign loads to the drivers; and that drivers use to accept or reject assignments.

haul goods for the Respondent's customers; and the Respondent would be unable to fulfill its core mission. Likewise, without their owned or leased trucks, the drivers would also be unable to perform their job function or meet the Respondent's business needs. Both instrumentalities are critical to the drivers' job and the Respondent's business operation.

In *SuperShuttle*, the Board found that the franchisees' made "a significant initial investment in their business by purchasing or leasing a van;" and the van is one of the primary instrumentalities their work. The Board made this finding because the evidence revealed that the franchisees possession of the van allowed them to work "whenever and wherever they choose." *SuperShuttle* at 19. The Board also found that the employer's dispatching devices were a primary instrumentality of the franchisees' work because it was part of the franchise agreement and the franchisees were charged a weekly fee for them. Again, I find, for the reasons stated above and in the ALJD, that the drivers' trucks are a primary instrumentality of their work for the Respondent. In the underlying trial, however, I failed to credit the importance of the Respondent provided chassis which enabled the drivers to haul goods for the Respondent's clients. Moreover, similar to the drivers in *SuperShuttle*, the drivers in this case also use a data transmission service that is compatible with SmoothCom, the Respondent's mobile application and operating system to receive information from dispatchers regarding assignments and customer information.[17] Similar to the drivers in *SuperShuttle*, the drivers in this case have to pay a recurring fee to the Respondent for use of the chassis and the SmoothCom system. Unlike the drivers in *SuperShuttle*, the Respondent does not provide the drivers with almost all of their "instrumentalities and tools". While the Respondent does furnish the drivers with important instrumentalities (operating authority and SmoothCom), the drivers supply their own, at least equally important tool, the truck. Based on the evidence, I find that the most significant and consequential instrumentalities are provided by the drivers.

Accordingly, I have reevaluated this factor through the lens of entrepreneurial opportunity and find that this factor still weighs slightly more in favor of independent contractor status.

6. Length of time drivers were employed

The ICOC provides that the duration of the agreement is for ninety (90) days from the signing of the contract. Additionally, if the driver is organized as a limited liability company (LLC), corporation or:

> other form of legal entity and in good corporate standing under Applicable Law, this Contract will renew without action by either party for three (3) additional ninety (90) day periods, unless either party givers notice of non-renewal to the other party for any reason at least thirty (30) days before the end of any such 90-day period.

[17] A detailed explanation of the SmoothCom system was set forth in the decision in the underlying trial.

(GC Exh. 52, p. 3.) Even if the contract has expired, the provisions will continue in effect for up to 3 months after expiration so long as the driver is still accepting trips from the Respondent and the contract "has not been superseded and replaced by a new agreement." Id. It renews automatically every 90 days for drivers who have organized themselves as an LLC, corporation or other legal business. Ten drivers testified at the underlying hearing on the length of their relationship with the Respondent. Since at least 2010, Jose Herrerra (Herrerra), Domingo Avalos (Avalos), Jose Lopez (Lopez), Napoleon Gaitan (Gaitan), Canales, Mario Montenegro (Montenegro), and Solis drove for Pacer and then continued driving for the Respondent after it took ownership of the company. Michael Ackling (Ackling), Lawrence Decoud (Decoud), and Brian Davis (Davis) had shorter stints transporting goods for the Respondent, but nonetheless, each has driven for the Company for at least 2 years. Enrique Flores admitted they have drivers who remain on their contract with the Respondent for "10, 20, 30 years …" (Tr. 2327.) Despite the contract's language, the facts in evidence establish that, in practice, the drivers expected and were retained for an indefinite period and not on a job-to-job basis.

Since the evidence supports my findings on this factor during the underlying hearing and the Respondent has not offered additional arguments or facts to persuasively challenge those findings, I find that this factor continues to weigh in favor of employee status.

7. Method of compensation

The Respondent argues that the drivers knew they could and did negotiate the terms of their compensation. In support of its argument, the Respondent points to some drivers who hired attorneys to negotiate the terms of the ICOC on their behalf. The Respondent cites several factors to bolster its contention that this factor weighs in favor of independent contractor status: (1) the ICOCs "expressly contemplate pay negotiations"; (2) drivers have increased bargaining power in "spot pricing" negotiations; (3) drivers are not paid hourly nor guaranteed revenue from the Respondent; and (4) the Respondent compensates drivers based on the type of delivery and the distance traveled in miles to deliver the goods. I addressed earlier in this decision the Respondent's argument that there is a wide range of compensation among the drivers which shows they have significant opportunities to increase their compensation. Therefore, I will not repeat it.

According to the General Counsel, recent Board cases support my ruling in the underlying hearing that this factor weighs in favor of employee status and should not be overturned. The General Counsel argues that the method of compensation in this matter more closely resembles those in *Intermodal Bridge Transport* and *Nolan Enterprises, Inc*., which the Board found were distinguishable from the relationship of compensation in *SuperShuttle.* The Charging Party agrees with the General Counsel but also argues that this factor supports employee status because the Respondent's income is dependent on the amount of work the drivers perform.

In *Intermodal Bridge Transport*, the drivers were paid weekly which the Board found was a strong indicator of an employer-employee relationship. The Board also noted that the fuel charges, per-load rate, and other non-negotiable expenses were set by the employer and created an employer-employee relationship. In the matter at hand, the evidence unequivocally shows

that the drivers are not paid on an hourly or monthly basis or at the completion of each delivery. Rather, the Respondent, like the employer in *Intermodal Bridge Transport*, compensates drivers weekly based on the number and types of deliveries they complete for the week. Occasionally, the Respondent will pay the drivers above the normal rate for extra tasks requested by the clients. The drivers' compensation varies depending on many factors e.g., number of deliveries, miles driven, number of trucks leased or owned, number of second-seat drivers. Nonetheless, the pay rates for deliveries, fuel surcharges, accessorial-related fees, hazardous material shipment premium, labor charges, chains/tie downs, wait times, and a host of other fees are determined by the Respondent. (GC Exh. 52, Schedule B.) Moreover, the Respondent negotiates with clients, without input from the drivers, over the rates it will charge the customers. It also decides unilaterally the formula to use for calculating the mileage rate paid to drivers. The drivers were not involved in the formula created and used to calculate the rate schedule for drivers. The terms of the contract allow the Respondent to unilaterally change the driver's fees after giving at least a fifteen (15) day notice. After receiving notice of the proposed fee changes, the driver can consent to the change or if the driver refuses, the Respondent can terminate the contract.

The Respondent continues to argue that because "numerous" drivers hired attorneys to negotiate higher compensations, it proves the rates and other expenses are negotiable. (R. Br. 15.) The record, however, does not contain evidence that for the relevant period a significant or even moderate number of drivers negotiated significant changes or increases in their levels of compensation. Although there is evidence that a small fraction of the drivers negotiated changes to the point-to-point rate paid for a job, the record is devoid of substantive evidence showing that numerous other payments unilaterally implemented by the Respondent are negotiable. There is no evidence, for example, showing that the Respondent's unilaterally determined fees paid to drivers for the carrier's fuel surcharge ("FSC"), accessorial amounts, and "Clean Truck Operation" fee were subject to negotiations. While the ICOC allows for changes to the fees paid to drivers, it is clear from the language of the contract that the changes are for temporary and rare occurrences; and does not "expressly contemplate pay negotiations" for the pre-determined mileage calculations and compensation rates. (GC Exh. 60.) The compensation rates are pre-determined by the Respondent and set forth in Schedule B of the ICOC. The rates are based on the Respondent's estimation of the miles it takes to complete the delivery. The drivers do not have input into these predetermined mileage calculations. Moreover, if a driver decides to deviate from the route the Respondent used to calculate the mileage, he or she is responsible for any increased cost. The drivers do, however, receive additional compensation for certain bobtail moves and other services.[18] (GC Exh. 60.) There is evidence that drivers are able to negotiate for a premium payment to haul what the Respondent determines are "difficult" loads. However, those negotiations are based on the premium rates already established by the Respondent; and the drivers are simply negotiating whether they will be paid a premium if they accept a specific move. There is no persuasive evidence showing that the drivers are an equal partner in setting the premium rates or deciding when to offer them. The premium rates are simply another way for the Respondent to compensate drivers. The overall evidence shows that the Respondent's control over the rate and frequency of compensation outweighs the limited ability drivers have to boost their income by working more hours, hiring second-seat drivers or vying for premium pay.

[18] Bobtail moves are defined as the "movements of the tractor without a container." (GC Exh. 60, schedule B, p. 2.))

See *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011), enfd. 822 F.3d 563 (D.C. Cir. 2016).

It is undisputed that the Respondent does not pay the drivers fringe benefits, e.g., paid holidays, paid sick days, health insurance, vacation days. The Respondent also does not deduct taxes from their paychecks. Regardless, there are more indicia favoring employee status in this instance. See *Time Auto Transport, Inc*., 338 NLRB 626 (2002) (the board looked beyond the tax treatment in making a determination on employee status because there was a wealth of other factors favoring such); *Intermodal Bridge Transport* 369 NLRB No. 37 at 5 (found tax status alone did not necessarily favor a finding of contractor status).

Accordingly, I have reevaluated this factor through the lens of entrepreneurial opportunity and find that this factor weighs in favor of employee status.

8. Whether the parties believe they are creating an employer-employee relationship

Neither the General Counsel nor the Charging Party added to their original argument that the proper consideration for determining employee status under this factor is "the putative employees' belief as to whether they are employees or independent contractors." (GC Br. 87; CP Br. 41–42.) The Respondent reiterated its initial argument that its failure to provide drivers benefits, withhold taxes from the drivers' pay and the drivers signing the ICOC, which is replete with references to the drivers establishing an independent contractor relationship with the company, are proof the drivers knowingly created an independent contractor relationship with the Respondent. Further, the Respondent noted that because of my reliance on *FedEx* in initially analyzing this factor, I must reconsider and reevaluate the facts in light of the Board's holding in *SuperShuttle*. The Respondent believes that the ICOC agreement and other actions the Respondent has taken are clear indications the drivers willingly agreed to entered into an independent-contractor relationship with the company.

In the underlying trial, the General Counsel argued that despite signing the ICOC, the drivers did not believe they were contractors because they did not understand its terms. According to the General Counsel, a sizable portion of the drivers were not fluent in speaking or reading English but were provided the written agreement in English and were not given an adequate opportunity to review it. The Acting General Counsel did not pursue this argument at the supplemental trial. I still do not find the General Counsel's position persuasive on this point. As I previously found, the drivers were given the agreement in Spanish and English; and the employer's managers held a series of meetings with the drivers to explain to them, in Spanish, the terms of the agreement. Approximately 2 months before the March 31, 2016 deadline to sign the ICOC, the drivers were also given a copy to take home and review. Some drivers gave the agreements to their lawyers to review, others reviewed it with family or friends, and still other drivers admitted to signing the agreements without reviewing the terms.

The Respondent argues that the evidence clearly establishes that all parties knowingly and willingly entered into an independent contractor relationship. According to the Respondent, there are several indicia of their independent contractor relationship which includes, among other

acts, that the Respondent does not withhold taxes from the drivers' paychecks or provide benefits; drivers are able to incorporate, personalize their trucks, hire employees to operate their trucks, decide their own schedules, determine how much to work, and not required to wear uniforms or other items identifying them as the Respondent's employees.

It is undisputed that the ICOC labels the drivers as independent contractors rather than employees. Moreover, the drivers signed the ICOC and the attached Schedule N acknowledging their independent contractor status and the responsibilities and rights therein. (GC Exh. 52, Schedule N.)[19] The Board has held that independent contractor agreements are strong evidence that the parties believed they were entering into an independent contractor relationship. See, e.g., *Arizona Republic*, 349 NLRB 1040 (2007); *Standard Oil Co*., 230 NLRB 967 (1977). However, in *Intermodal Bridge Transport*, the Board did not reject the judge's finding that "the fact that those documents [labeling the drivers independent contractors] are unilaterally created and imposed by [the Respondent] diminishes the weight to be given them." Likewise, there is no evidence that in this case the drivers were able to negotiate a change in the agreement to their classification as independent contractors. Rather, the Respondent unilaterally drew up the terms governing the parties' working relationship. Moreover, the ICOC specifically states that if a "Reclassification Decision" is issued then either party may terminate the contract on one day's notice. There is credible testimony that the Respondent informed the drivers in a series of meetings that if they did not sign the ICOC by the deadline they would be unable to drive for the Respondent. (Tr. 849–854, 1215–1216.) This is further supported by the Respondent's witness, Camacho, who testified in the underlying trial that about 20 drivers, who had driven for the Respondent prior to the introduction of the ICOC, declined to sign it and subsequently stopped providing service for the Respondent. Further, there is absolutely no evidence that the drivers were told they could negotiate their independent contractor or independent business designation.

The evidence establishes that the drivers file tax returns as independent businesses and deduct business expenses on their taxes. It is undisputed that the Respondent does not withhold taxes or provide benefits. Several drivers testified that they understood, agreed with, and desired their designation as independent contractors. In the underlying trial, Montenegro, Decoud, Acklin, and Davis testified that they viewed themselves as independent contractors and for financial reasons preferred it. While drivers are able to incorporate, I previously found, after a detailed analysis of the facts, that the drivers' ability to drive simultaneously for the Respondent and other businesses is severely restricted, therefore rendering this factor illusory. There is also evidence that only a tiny number of drivers hired second-seat drivers to operate their trucks. Based on the entire record, I find that the small number of second-seat drivers and the Respondent's ultimate control over whether to authorize or terminate their ability to drive for it renders almost meaningless the drivers control over second-seat drivers. Last, the drivers' abilities to personalize their trucks and the freedom not to wear a company uniform are

[19] Second-seat drivers do not sign the ICOC. However, they sign Schedule K of the ICOC which relates to privacy disclosures and consent form. Schedule K clearly designates the drivers and second-seat drivers as contractor and contractor driver. (GC Exh. 60, Schedule K.) Driver Blair Davis (Davis) testified at the hearing that he requires his second-seat drivers to sign a document acknowledging their independent contractor status. (R. Exh. 32; Tr. 1774–1775.) There is no evidence that other drivers who employ second-seat drivers use a similar form.

insignificant indicia of independent contractor status and do not outweigh the other indications of employee status.

Accordingly, I have reevaluated this factor through the lens of entrepreneurial opportunity and find that this factor weighs in favor of employee status.

9. Whether the principal is or is not in the business

As previously discussed, both here and in the underlying decision, I found that despite the additional drayage related services the Respondent performed, there was no substantive distinction between its core businesses and the function of the drivers. Even after reevaluating this factor through the lens of entrepreneurial opportunity, I continue to find that this factor weighs in favor of employee status.

In sum, although there are some factors supporting independent contractor status, I find that there are more factors favoring employee status. Accordingly, I find that the drivers are employees protected by the Act during the relevant period and, as such, violated the Act as it pertains to the previously addressed individual 8(a)(1) and (3) charges.[20]

## CONCLUSIONS OF LAW

1. The Respondent, XPO Cartage, Inc., Commerce, California, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. By, on May 5, 2015, interrogating an employee about the employee's union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees the Respondent has violated Section 8(a)(1) of the Act.

4. By, on May 5, 2015, soliciting employee complaints and grievances, promising its employees increased benefits and improved terms and conditions of employment, the Respondent has violated Section 8(a)(1) of the Act.

5. By, in the months of March through June 2015, denying a truck repair loan to its employee Domingo Avalos, and then requiring him to make a large cash payment to have the truck repaired, the Respondent has violated Section 8(a)(1) and (3) of the Act.

6. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not violated the Act except as set forth above.

[20] Refer to the underlying ALJD addressing the 8(a)(1) and (3) charges filed against the Respondent.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily denied a truck repair loan to Domingo Avalos and required him to make a larger down payment because of his union activities must make him whole for any loss of earnings and other benefits he suffered as a result of the discrimination against him from the date of the discrimination to the date he is made whole. Compensation shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall compensate Domingo Avalos for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

## ORDER

The Respondent, XPO Cartage, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee complaints and grievances, promising its employees increased benefits and improved terms and conditions of employment.

(b) Interrogating employees about their union membership, activities, and sympathies.

(c) Denying loans or other benefits to employees because of their union membership, sympathies and, or other protected concerted activities; or otherwise subjecting employees to adverse employment consequences because they engage in union or other protected concerted activities.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of the Board's Order, offer Domingo Avalos, if he still desires the loan, a truck repair loan under the same terms and conditions as offered to other employees.

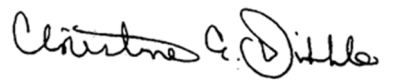
(b) Make Domingo Avalos whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of payment due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Commerce, California, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 30, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. April 30, 2021



Christine E. Dibble (CED)
Administrative Law Judge

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT deny loans to or otherwise demand from employees greater requirements to secure the loan because of their support for the International Brotherhood of Teamsters.

WE WILL NOT interrogate employees about their union membership, activities, and sympathies in an effort to interfere with, restrain, and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL NOT solicit employee complaints and grievances or promise employees increased benefits and improved terms and conditions of employment in an effort to interfere with, restrain, and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL, make Domingo Avalos whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, compensate Domingo Avalos for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

**XPO CARTAGE, INC.**

**(Employer)**

**Dated** _____ **By** _____

**(Representative)** **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

**312 Spring Street, Suite 10150**
**Los Angeles, CA 90012-4701**
**Telephone: (213) 894-5200**
**Fax: (213) 894-2778**
**Hours of Operation: 8:30 a.m. to 5:00 p.m. PT**

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-150873 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.** THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 634-6502.